IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11278 of 2007

with

CIVIL APPLICATION No. 6789 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? 1 & 2: YES; 3 to 5 NO

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LAMBHA BALIAKAKA PROPERTY TRUST & 2 - Petitioner(s)
Versus
TULSABEN DHARAMBHADUR SHAHI - Respondent(s)

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Appearance :
MR DEEPAK V PATEL for Petitioner(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1,
MR SHAILESH C SHARMA for Respondent(s) : 1,
None for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 11/05/2007

ORAL JUDGMENT :

1. The petitioner, president of a property trust, has invoked Articles 226 and 227 of the Constitution for a writ of certiorari or any other appropriate order, writ or direction to set aside the order dated 10.4.2006 in Gratuity Application No.29 of 2005 of the Controlling Authority at Ahmedabad and the order dated 24.2.2007 dismissing the appeal preferred therefrom with the direction to quash the consequential notice of recovery of the amount of gratuity awarded to respondent No.1 herein.

2. Simple facts of the case are that respondent No.1 had claimed gratuity from the petitioner on the basis that her husband had joined service as watchman since 2.1.1971 and, after he was discharged on 26.2.2001, he had passed away on 22.2.2003. On the basis of his last drawn salary of Rs.2,000/- per month and service of 30 years, she claimed Rs.34,650.92 ps. by way of gratuity. An application in Form 'K' prescribed under the Payment of Gratuity (Gujarat) Rules, 1973 (for short "the Rules") was submitted to the petitioner on 22.9.2005 and an application in Form 'N' under the same Rules was submitted on 14.10.2005 to the Controlling Authority under the Payment of Gratuity Act, 1972 (for short, "the Act"). Thumb impressions of the

applicant were put on the said applications and an affidavit dated 18.1.2006 was submitted before the Controlling Authority to, *inter alia*, submit that she was the widow of the deceased employee, that she was the only heir of the deceased, her name was entered as such in respect of other assets of the deceased and she was maintaining the family of her husband. It was also stated by her that she was earning her livelihood by doing labour work and maintaining three sons, namely, Gangaram aged 30, Rajesh aged 26 and Khemraj aged 15, even as the former two sons were living separately. She categorically stated that she had not remarried and did not propose to remarry. However, an affidavit dated 23.2.2006 of Kanubhai alias Rajeshbhai claiming to be a son of the deceased was filed by the employer with the statements, *inter alia*, that he was the son of another wife of the deceased, that he had learnt that the respondent-widow had remarried and was living with her second husband; that he was employed in the place of his father and he and his two other brothers were the legal heirs of the deceased workman. He claimed ignorance about the whereabouts of the husband with whom the respondent-widow had remarried. The petitioner-employer also, on the same day, filed a detailed written statement raising objections about jurisdiction, applicability of the Act, status of

the widow and non-jointer of the other heirs; and disputing the calculation of the amount claimed as also requesting to allow cross-examination of the widow.

2.1 The Controlling Authority has, in its impugned order dated 10.4.2006, recorded that authorized representative of the petitioner, namely, Advocate Shri Dipak Parmar, had expressed his consent to the payment of gratuity to the widow and that consent was recorded. The Controlling Authority accepted the claim and the details on which it was based and observed that the affidavit dated 23.3.2006 of the son of the deceased by his deceased wife was produced by advocate of the employer, and not by him in person. In view of the statement made by the widow in her affidavit dated 28.1.2006 that she had not remarried and she did not propose to remarry, the impugned order to pay her Rs.34,614/- by way of gratuity was made.

3. Being aggrieved by the aforesaid order, the petitioner preferred an appeal, after delay of about three months and 15 days, and raised the grievances, *inter alia*, that the Controlling Authority had ignored the affidavit of the son of the deceased, that it was required to determine

the heirs and their share, that a will, succession certificate or an order of competent court was required to be placed on record before ordering payment of gratuity to any particular heir, that the factual basis of the claim of gratuity were not admitted by the appellant and were required to be proved and that the advocate had not given consent to payment of gratuity as recorded in the order of the Controlling Authority. Thereafter, a so-called brief note of the arguments was submitted to the Appellate Authority before the impugned order dated 27.2.2007 was made rejecting the appeal mainly relying upon the affidavit of the widow and the fact that the appeal was preferred when Controlling Authority had already issued a recovery certificate for recovering the amount as arrears of land revenue.

4. Learned counsel for the petitioner, Mr.Dipak V.Patel, extensively and elaborately argued, after submitting a written note of his submissions, that both the orders under challenge were illegal, perverse and without jurisdiction. He submitted that the Controlling Authority and the Appellate Authority ought to have joined the heirs as respondents, and the quasi-judicial authorities could not have decided rights of

interested parties merely on the basis of affidavits when serious disputes were raised by the petitioner. There was no dispute about the fact that the deceased had left three sons who were not joined as parties even as indisputably they were the legal and real heirs of the deceased and were entitled to a share in the amount of gratuity. In the face of these patent facts, the Controlling Authority had no jurisdiction and power to make the impugned order and such order could not have been confirmed by the Appellate Authority by another perverse and cryptic order, according to his submission. He also submitted that the impugned orders were made without application of mind and without following the principles of law and no judicious mind can allow them to stand. After submitting that no authority was required for a judicially trained mind, following judgments were cited in support of the submissions by learned counsel for the petitioner.

4.1 ***Smt. Kasturi Devi v. Deputy Director of Consolidation and Others [(1976) 4 SCC 674]*** was relied upon in support of the submission that, after remarriage, the wife becomes an absolute partner and an integral part of her husband and the principle on which she is excluded from

inheritance on remarriage is that, when she relinquishes her link with her husband, even though he is dead, and enters a new family, she is not entitled to retain the property inherited by her. In the facts of that case, Smt. Kasturi had claimed inheritance not as a widow of her husband but as the mother of her son, and it was noted that the court's attention was not invited to any text of the Hindu Law under which a mother could be divested of her interest in the property either on the ground of unchastity or remarriage. Another judgment of this court in ***Heirs of Anjana Samji Chela v. Heirs of Anjana Hirji Ahiji [2000 (3) GLR 2331]*** was equally inapplicable and was decided with reference to section 2 of the Hindu Widows' Remarriage Act, 1856 which has been repealed in 1983.

4.2 In Constitution Bench judgment of the Supreme Court in ***The Bharat Bank Ltd., Delhi v. Employees of The Bharat Bank Ltd. [1950 SCR 459]***, it was submitted that, when the procedure adopted by the Tribunal was against all principles of natural justice and the award was thereby vitiated, it should be set aside. The court observed: "*It happens that when the safeguard of an appeal is not provided by law, the tendency sometimes is to act in an arbitrary manner like a*

benevolent despot. Benevolent despotism, however, is foreign to a democratic Constitution. The members of the Tribunal seem to have thought that having heard the statement of the cases of the parties they could proceed to a judgment on their own view of its right or wrong unaided by any material. That kind of procedure to my mind is unwarranted by the statute and is foreign to a democratic Constitution. In these circumstances, it is the compelling duty of this court to exercise its extraordinary powers and to quash such an award." It was also observed therein that: "*It would be most dangerous for this court to condone proceedings of this character. If exceptional powers are not exercised even when a body legally constituted under the statute does not function according to the statute, then they defeat the very purpose of the Constitution.*"

4.3 ***Ebrahim Aboobakar and Another v. Custodian General of Evacuee Property [AIR 1952 SC 319]*** was relied upon for the observations made therein in paragraph 14 and to point out that the Tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further

exercise of their jurisdiction depends. ***Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi [AIR 1959 SC 492]*** was relied upon for the proposition that an erroneous decision of a subordinate court resulting into exercise of jurisdiction not vested in it by law or failing to exercise the jurisdiction so vested or its acting with material irregularity or illegality called for exercise of powers of revision by the High Court.

4.4 Relying upon judgment of the ***Supreme Court in The State of Madhya Pradesh v. Sardar D.K.Jadav [AIR 1968 SC 1186],*** it was submitted that, where jurisdiction of an administrative authority depends upon a preliminary finding of fact, the High Court was entitled, in a proceeding for a writ, to determine upon its own independent judgment whether or not that finding was correct. Judgment of *the King's Bench Division in* ***The King v. The Assessment Committee of the Metropolitan Borough of Shoreditch [KBD (2) 1910 page 852]*** was also relied upon to emphasis that no Tribunal of inferior jurisdiction can by its own decision finally decide on the question of existence or extent of such jurisdiction; such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp

a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise.

5. Learned counsel for the petitioner also relied upon judgment of the Supreme Court in ***Gujarat Mineral Development Corporation v. P.H.Brahmbhatt [AIR 1974 SC 136]*** for the proposition that an appellate court or a court having jurisdiction to entertain petitions challenging the verdict will not hesitate to interfere with findings of fact where there has been an illegality or an irregularity of procedure, or a violation of principles of natural justice, resulting in absence of fair trial or where there has been a gross miscarriage of justice, or where the Tribunal has spoken in two voices and has given inconsistent and conflicting findings, or where findings are vitiated by error of law or where conclusions reached by the courts below are so patently opposed to well-established principles as to amount to miscarriage of justice or where the finding is not supported by any legal evidence and is wholly inconsistent with the material produced on record, or where the High Court or the Tribunal below committed a serious error in

not examining evidence on a central issue with the care which it deserved. Judgment in ***Ram Chandra Singh v. Savitri Devi [(2003) 8 SCC 319]*** was relied upon in support of the proposition that it is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representation proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction *void ab initio*. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by application of any equitable doctrine including *res judicata*.

5.1 ***Hombe Gowda Educational Trust v. State of Karnataka [(2006) 1 SCC 430]*** was relied upon for its quotation in para 31 of a passage from *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (P) Ltd. [(1997) 6 SCC 450],* which reads as under:

> *"32. When a position, in law, is well settled as a result of judicial pronouncement of this court, it would amount to judicial impropriety to say the least, for the*

subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily have the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

Relying upon the judgment in ***State of Karnataka v. S.T.Hadimani [(2002) 3 SCC 25]***, it was submitted that it was always for the claimant to prove the basis of his claim when the facts were denied by the respondent.

5.2 Observations made in paragraphs 12 and 19 of the judgment ***in Smt.Shrisht Dhawan v. M/s. Shaw Brothers [AIR 1992 SC 1555]*** were relied upon for the proposition that, when authorities had addressed themselves to the wrong questions, misunderstood the guiding principle of burden of proof, misconstrued the requirements of the section and reached a totally irrational, unreasonable and unsustainable conclusion that the original order of the Controller was obtained by fraud, the High Court was wrong in affirming the totally unsustainable conclusion. And, the mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory

authority or tribunal can assume jurisdiction in respect of subject-matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends, the court or tribunal exercises the jurisdiction, the order is vitiated. Error of jurisdictional fact renders the order *ultra vires* and bad (Wade, Administrative Law).

5.3 Learned counsel Mr.Patel concluded his arguments with the submission that justice was required to be done to the real heirs and since both the authorities were bound to follow the judicial procedure in determining the rights and since the proceeding had civil consequences, the basic principles of natural justice were required to be observed and violation thereof in the present case had vitiated the proceeding.

6. Before dealing with the above contentions canvassed for the petitioner, it would be pertinent to take an over-view of relevant provisions of the Act and the Rules made thereunder. Gratuity is payable to an employee on termination of his employment, after he has rendered continuous service for not less than five years, on his retirement or resignation. In case of death of the employee, gratuity payable

to him is required to be paid to his nominee or, if no nomination has been made, to his heirs. The word "heir" is not defined in the Act and, therefore, it has to be understood to convey its normal meaning. Government of Gujarat has, in exercise of the powers conferred by sub-section (1) of section 15 of the Act, made Payment of Gratuity (Gujarat) Rules, 1973 (for short, "the Rules") which also do not define the term "*heir*". According to Black's Law Dictionary, "*heir*" means, '*a person who, under the laws of intestacy, is entitled to receive an intestate decedent's property, esp. real property; and loosely it means, a person who inherits real or personal property, whether by will or by intestate succession*'. Detailed provisions are made in the Rules for the purpose of carrying out the provisions of the Act. According to Rule 7, an employee who is eligible for payment of gratuity under the Act, or any person authorized in writing to act on his behalf, has to apply in Form "I" to the employer. Under Rule 7 (3), a legal heir of an employee who is eligible for payment of gratuity under the second proviso to sub-section (1) of section 4, shall apply, ordinarily within one year from the date gratuity became payable to him, in Form "K" to the employer. Under the provisions of Rule 8 (1), within fifteen days of the receipt of an

application under Rule 7, for payment of gratuity, the employer is duty bound, if the claim for gratuity is not found admissible, to issue a notice in Form "M" to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible. Under sub-rule (3), if the claimant for gratuity is a nominee or a legal heir, the employer may ask for such witness or evidence as may be deemed relevant for establishing his identity or maintainability of his claim, as the case may be. In that case, the time-limit specified for issue of notice under sub-rule (1) shall be operative with effect from the date such witness or evidence, as the case may be, called for by the employer is furnished to the employer.

6.1 Under Rule 10, if an employer refuses to accept nomination or to entertain an application sought to be filed under Rule 7, or having received an application under Rule 7 fails to issue a notice as required under Rule 8 within the time specified therein, the claimant is entitled to apply in Form "N" to the Controlling Authority for issuing a direction under sub-section (4) of section 7. After scrutiny of the application under Rule 10-B, the application has

to be registered. The procedure for dealing with the application for direction is prescribed under Rule 11, which requires calling upon the applicant as well as the employer to appear on a specified date, time and place either by himself or through his authorized representative together with all relevant documents and witnesses, if any. Under sub-rule (3) of Rule 11, a party appearing through an authorized representative shall be bound by the acts of the representative. And, under sub-rule (4), after completion of hearing on the date fixed under sub-rule (1), or after such further evidence, examination of documents, witnesses, hearing and enquiry, as may be deemed necessary, the Controlling Authority shall record his finding as to whether any amount is payable under the Act to the applicant. Under Rule 13, the Controlling Authority is empowered, at any stage of the proceedings before him, either upon or without an application by any of the parties involved in the proceedings before him, and on such terms as may appear to be just, to issue summons to any person either to give evidence or to produce documents or for both purposes on a specified date.

6.2 It would appear from perusal of the above relevant provisions that a special scheme is evolved for a swift procedure of resolving dispute arising out of the claim of gratuity and, rather than a fixed procedure, full flexibility is allowed to the Controlling Authority in the matter of taking evidence, examination of documents or witnesses and carrying out enquiry into the issues and disputed facts. Such enquiry, however, may not include an enquiry into or adjudication of the matter of succession so as to determine the rights of rival claimants, if more than one person were claiming as heir a share in the amount of gratuity and the respective shares of the claimants were to be determined. Ratio of several decisions relied upon for the petitioner would support that proposition. Who would be the legal heirs to the deceased employee and in what proportion should they share the inheritance would be dependent on the religion and personal law applicable to the deceased and the applicants. However, the question of determining respective share of each of the heir could arise before the Controlling Authority only in case the claim was made by more than one heir and there was no consensus about sharing the amount of gratuity. As far as making the claim of gratuity is concerned, any heir is entitled to apply and pursue the proceeding in accordance with the

provisions of the Act and the Rules; and there is no legal requirement of joining all the heirs as parties.

7. In the facts of the present case, the proceedings are pursued in accordance with the Rules only by the respondent-widow and it was by way of a defence that the petitioner had raised objection of there being other heirs and it was to fortify that objection that the affidavit of one of the sons was filed. Incidentally, the issue of remarriage of the widow, without any details of the date of such remarriage, the person who had married the respondent-widow, or their place of living, was also raised by that affidavit. The petitioner did not avail the opportunity of leading any evidence of their own as regards the salary or tenure of the deceased husband or produce any son as a witness though the details furnished all throughout by the widow as the basis of her claim were denied by the petitioner. The allegation of remarriage was categorically denied by the widow by filing her affidavit before the Controlling Authority. As recorded in the impugned order dated 10.4.2006, the parties were called for hearing on several occasions during the period from 1.12.2005 to 20.3.2006, even as the employer had failed to

follow any of the mandatory provisions of Rule 8. In such circumstances, the Controlling Authority was justified in drawing the necessary inferences from the material on record. As Earl Warren said: "*It is the spirit and not the form of law that keeps justice alive.*"

8. From the above course of events, it also appears that learned advocate and representative of the petitioner had, at one stage, consented to an order for payment of gratuity being made in favour of the respondent-widow and, afterwards, raised several issues with the help of her son who is admittedly employed by them. It appears to be of a piece with that strategy that a civil application is also filed in the present proceeding by all the three sons with the prayer to join them as party-respondents and legal heirs of the deceased employee. It is again averred that the respondent-widow had remarried after the death of their father and had ceased to be his legal heir. Their address in the application is that of the petitioner; and, again, no details whatsoever about the alleged remarriage of the widow are stated in the application. Despite the above mandatory provisions of sub-Rule (3) of Rule 11, no affidavit is ever filed by, or in respect of the consent of, the representative of

the petitioner, which is recorded in the impugned order of the Controlling Authority.

9. In the above facts and circumstances, the whole exercise of carrying on the litigation against the illiterate widow of the deceased employee, even after consenting to an order in her favour, clearly appears to be an abuse of the process of court by involving the sons of the deceased who are admittedly in the employment of the petitioner. As far as the claim of a share in the amount of gratuity of each of the sons of the deceased employee or any other heir is concerned, it can now be determined only by an appropriate proceeding in a civil court on the basis of essential facts and applicable provisions of law. It is not the decision and determination by the Controlling Authority which is without jurisdiction, but it would have been beyond its jurisdiction to enter, on its own and without a rival claim being duly made, into the area of law of succession and determine the respective shares of the heirs for the purpose of dividing the amount of gratuity. The Allahabad High Court appears to have adopted the right approach in ***Asha Devi v. Sharda Devi [1977 Lab IC 1939]*** in holding that the competent authority would not be justified in awarding the amount of gratuity when

there was a dispute between two sets of persons as being heirs of the deceased, since such a dispute ought to have been settled by a civil court.

10. Therefore, it is held that, in the facts of the present case, the Controlling Authority had duly exercised its jurisdiction and complied with the procedural requirements prescribed by the Rules; that there was no contest or claim by any other heir, even as the other heirs were aware about pendency of the proceeding and had filed an affidavit but avoided to duly stake their claim after following the prescribed procedure. Thus, no case was made out for interference with the impugned orders in exercise of the extraordinary jurisdiction of this court under Article 226 or 227 of the Constitution.

11. However, rejection of the petition shall not imply that other heirs of the deceased employee were disentitled from claiming their share and agitate such claim in the appropriate forum against the respondent-widow. That position was accepted and conceded by learned counsel for the respondent-widow. He has further clarified that the respondent-widow did not mind sharing the gratuity with one of the sons who was born

out of her wedlock with the deceased employee and, as for the two other sons born out of the earlier marriage of the deceased employee, they would be entitled to claim their shares, if they were legally entitled to it, in an appropriate proceeding. It was also conceded by him that the petitioner, as the employer institution, should stand absolved of any further liability as far as the claim of gratuity arising from the service of the husband of the respondent-widow was concerned. However, learned counsel appearing for applicants in the civil application for joining three sons of the deceased-employee as party respondents, submitted that they reserved their right to agitate their claim for payment of gratuity and claim the amount from the petitioner. While rejecting that Civil Application as not *bona fide* and not maintainable at this stage, it is held, in order to ensure quietus of the matter of gratuity and litigation in that regard against the petitioner, that applicants of that application shall not be entitled to re-agitate the issue of gratuity against the petitioner. With these observations, main petition is dismissed with cost quantified at Rs.3,000/- which shall be paid by the petitioner to respondent No.1. Notice is discharged.

The request to stay operation of this order and to continue for a period of eight weeks, the stay against disbursement of the amount deposited with the Appellate Authority, is rejected as there is no justification for granting such relief after fulfledged hearing and disposal of the petition.

Sd/-

(D.H.Waghela, J.)

(KMG Thilake)